PUBLIC PROSECUTOR

v.

BALDEV SINGH

HIGH COURT MALAYA, PENANG
ZAKARIA YATIM J
[CRIMINAL APPEAL NO. 3 OF 1984]
27 FEBRUARY 1985

CIVIL PROCEDURE: *Findings of fact by trial Court - Interference by Appellate Court - Substitution of finding.*

EVIDENCE: *Burden on Prosecution to prove guilt.*

The respondent was a practising advocate and solicitor who was charged for cheating and for criminal breach of trust in the Sessions Court, Penang. The President found that in respect of the first charge, the prosecution had failed to make out a *prima facie* case against the respondent. In respect of the second charge, the respondent was called to enter his defence. Evidence for the defence was heard. The respondent was acquitted and discharged of both charges. The DPP appealed against the Order of Acquittal and discharge in respect of both charges.

Held:

[1] The President had carefully evaluated all material evidence before him and had found the evidence adduced by the prosecution inherently incredible. The prosecution had also failed to prove one or more of the ingredients of the charge. Therefore the trial Court is justified in not calling upon the accused to enter his defence.

[2] On matters of fact, the appellate Court can interfere in appropriate cases. But before doing so, the appellate Court should give proper weight and consideration to the credibility of witnesses. Furthermore, an appellate Court should be slow in disturbing a finding of fact arrived at by the Judge who had the advantage of seeing the witness. As the President had made a proper finding of fact, there was no need to interfere with such finding.

[3] Where there was evidence to support the defence and there was no misdirection by the Subordinate Court, the High Court could not substitute its own finding for that of the Subordinate Court. Therefore, the President having evaluated the defence's evidence carefully, had come to the right decision when he accepted the defence's explanation in relation to the second charge.

[4] The prosecution had failed to prove the guilt of the accused.

[Appeal dismissed.]

Cases referred to:

Haw Tua Tau v. Public Prosecutor [1981] 2 MLJ 49; [1981] CLJ (Rep) 11
Ragunathan v. Pendakwa Raya [1982] CLJ (Rep) 63
Public Prosecutor v. Abang Abdul Rahiman [1982] 1 MLJ 346
Lim Kheak Teong v. Public Prosecutor [1983] Cr App 12
Rajoo v. Rex [1949] 15 MLJ 250

Legislation referred to:

Prevention of Corruption Act 1961, s. 4(c)

For the appellant - T.S. Sambanthanmurti, DPP
For the respondent - Karpal Singh (Lim Ewe Hock with him); M/s Karpal Singh & Co.

JUDGMENT

Zakaria Yatim J:

The respondent was at the material time a practising advocate and solicitor in the office of Messrs. Tripital Singh and Company, Penang.

On 28 March 1975 he was charged in the Sessions Court, Penang with two charges - one was for cheating and the other for criminal breach of trust. With regard to cheating, it was alleged in the charge that the respondent cheated the Pacific and Orient Underwriters Sdn. Bhd. by dishonestly inducing them to pay him RM3,500 in respect of an accident claim made by one Mohamed Salleh bin Abdul Rahman, by falsely representing that Mohamed Salleh was alive when the respondent knew that he was already dead. With regard to the other charge, it was alleged that the respondent being an agent of the said Mohamed Salleh was entrusted with a sum of RM3,500 committed criminal breach of trust in respect of part of the money namely RM2,100.

At the close of the case for the prosecution, the learned President found that in respect of the first charge, the prosecution had failed to make out a *prima facie* case against the respondent, who was accordingly acquitted and discharged. With regard to the charge on criminal breach of trust, the learned President called upon the respondent to enter his defence. After hearing the respondent's evidence on oath and the evidence of his witnesses, the learned President was satisfied with the defence explanation. He found the respondent not guilty of the charge and acquitted and discharged him.

The learned DPP now appeals against the Order of Acquittal and discharge in respect of both the charges.

During the hearing of this appeal, the learned DPP made a very lengthy submission in which he said the learned President had misdirected himself on the question of facts. He went into the record of the trial in great detail and submitted that the President had reached the wrong conclusion in respect of the oral evidence as well as the documentary evidence.

The learned DPP submitted that the President was wrong in not calling for the defence in respect of the first charge. According to him, at the end of the case for the prosecution, what the President had to decide was a question of law whether the defence should be called or not. In support of his submission, the learned DPP relied on the Privy Council decision in *Haw Tua Tau v. Public Prosecutor* [1981] CLJ (Rep) 11. This decision was in respect of an appeal from the Singapore Court of Appeal but the Federal Court in *Ragunathan v. Pendakwa Raya* [1982] CLJ (Rep) 63, held that the principle laid down by the Privy Council in the *Haw Tua Tau case*, *supra*, applies in this country. The relevant part of the Privy Council decision is as follows:

> At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the Judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding "that no case against the accused has been made out which if unrebutted would warrant his conviction", within the meaning of s. 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the Judge such arguments and comments on the evidence as they may wish to advance.

It is clear from the judgment of the Privy Council that what the trial Court has to decide at the end of the prosecution case remains a question of law only. But in arriving at a conclusion, the trial Court has to examine the evidence before him. If the evidence is inherently incredible or if the prosecution fail to prove one or more of the ingredients of the charge the trial Court is justified in not calling upon the accused to enter his defence.

In the present case, I have read the judgment of the learned President and I think he had carefully evaluated all the material evidence before him and drew his own conclusion. He discussed at some length the evidence of the key witnesses of the prosecution in particular, the evidence of PW7, PW8 and PW9. The learned President said, "Their evidence revolves around two vital questions (1) the identity of the recipient of the information of the death of Mohd. Salleh and (2) the knowledge (or the lack of it) of the accused." His evaluation of the evidence of the three witnesses are as follows:

> The witnesses not only contradict each other they also contradict themselves. They say one thing in one breath and something entirely different in the next and the same process is repeated over and over again, with each of the three witnesses. It is impossible to ascertain which of the versions is the correct one.

After considering the whole evidence, the learned President made the following findings:

> The first question the Court has to ask itself is whether or not (from the evidence adduced) the accused knew that Mohd. Salleh had died when he made the representation contained in P9. The evidence adduced on this point by PW7, PW8 and PW9 is absolutely chaotic, confusing, unreliable and totally irreconcilable ... The letter P9 is another indication that the accused was not aware that Mohd. Salleh had died ... This evidence to my mind excludes the evidence of a dishonest intention which is an essential ingredient in a cheating charge ... In the circumstances I hold that the first ingredient has not been proved.

From the findings of the President, it is clear that he had found that the evidence adduced by the prosecution was inherently incredible. More significant still he had found that the ingredients of the first charge had not been proved by the prosecution. In my opinion, the President was fully justified in acquitting the respondent in respect of the first charge without calling his defence.

The learned DPP urged the Court to interfere with the finding of fact made by the learned President on the ground that such finding was wrong. It is true that on matters of fact this Court, sitting as an appellate Court, can interfere in appropriate cases. But before doing so the appellate Court should give proper weight and consideration to the views of the Trial Judge as to the credibility of the witnesses. Furthermore, an appellate Court should be slow in disturbing a finding of fact arrived at by the Judge who had the advantage of seeing the witnesses. See *Public Prosecutor v. Abang Abdul Rahiman* [1982] 1 MLJ 346 @ 349. In the instant case I am satisfied the learned President had made a proper finding on the facts and I do not intend to interfere with such finding.

I shall now turn to the second charge. As already stated, the learned President was satisfied with the defence explanation and accordingly acquitted and discharged the respondent. In his grounds of judgment, he made the following findings:

> In the circumstances the defence version is accepted. Where there is a doubt, the matter must always be resolved in favour of the accused ... The accused may well have been guilty of some breach of duty or discipline under the Solicitors Ordinance but he certainly is not guilty of the offence with which he is charged ... All in all I feel that under the circumstances the accused has given a reasonable explanation which is consistent with innocence and he is therefore entitled to an acquittal.

In my view the learned President had evaluated the evidence of the defence carefully and I do not think there is any misdirection in this case. In considering the defence case, it is relevant to refer to the case of *Lim Kheak Teong v. Public Prosecutor* [1983] Cr App 12). In this case the applicant was charged in the Sessions Court, Kuala Lumpur on two counts under s. 4(c) of the Prevention of Corruption Act 1961. At the close of the case for the prosecution the President called for the defence in respect of both charges. In his judgment, the President stated that after considering the evidence and after observing the demeanour of the applicant he found that the applicant was giving an explanation consistent with his innocence. He accepted the explanation of the applicant. He also found the applicant had raised a reasonable doubt on the prosecution's case. On appeal to the High Court, the learned Judge substituted a conviction for the acquittal in respect of both charges. Following this decision the applicant asked the Federal Court to make a ruling on the following question:

> In an appeal against acquittal from the decision of a Subordinate Court to the High Court raising only questions of fact, where there is evidence to support the defence and there has been no misdirection by the Subordinate Court can the High Court substitute its own finding for that of the Subordinate Court?

The Federal Court, after considering the various authorities, answered the question in the negative. In view of the decision of the Federal Court, I find that the learned President had come to the right decision when he accepted the defence explanation. I should mention here that when an accused person is called upon to make his defence, the burden upon him is not the same as that of the prosecution. On the other hand from the beginning of the case until the end, the burden remains upon the prosecution to prove the guilt of the accused. *Rajoo v. Rex* [1949] 15 MLJ 250. In the present case the prosecution had failed to discharge the burden to the end.

For the reasons stated above, the appeal is dismissed.

Also found at [1985] 1 CLJ 348